

PACIFIC BELL

IBLA 87-247

Decided August 25, 1988

Appeal from a decision of the Redding Resource Area Office, Bureau of Land Management, increasing the rental for right-of-way CA SAC 079486.

Affirmed as modified.

1. Appraisals--Rights-of-Way: Generally--Rights-of-Way: Act of March 4, 1911

A party holding a right-of-way issued under the Act of Mar. 4, 1911, may choose to appeal a rental reappraisal conducted under 43 CFR 2802.1-7(e) (1979) without first pursuing a factual hearing. In such a circumstance, upon obtaining a written waiver of the right to a hearing, BLM may issue a decision imposing the reappraised rental, subject to appeal to the Board of Land Appeals.

2. Appraisals--Rights-of-Way: Appraisals

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of a right-of-way rental or the appellant shows that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

3. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

Increased rental charges for a right-of-way issued under the Act of Mar. 4, 1911, and reappraised under 43 CFR 2802.1-7(a) (1979) are imposed "commencing with the ensuing charge year." The ensuing charge year is the rental year which begins following the date of the decision giving notice of the reappraisal and an opportunity for a hearing.

APPEARANCES: Warren L. Hicks, Real Estate Management Office, Pacific Bell, Sacramento, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Pacific Bell has appealed a December 29, 1986, decision of the Redding Resource Area Office, Bureau of Land Management (BLM), upholding a determination dated September 23, 1986, which notified the company that pursuant to 43 CFR 2802.1-7(e) (1979) the fair market rental value for right-of-way CA SAC 079486 had been reappraised and that the rental would be increased to \$4,500 per year.

BLM's September 23, 1986, letter to Pacific Bell also informed the company that, in accord with 43 CFR 2802.1-7(e) (1979) it could obtain a hearing on the reappraisal before the Redding Area Manager by filing a request within 30 days. Pacific Bell did not request a hearing, but filed a notice of appeal on October 17, 1986. The notice was followed by a statement of reasons filed on November 12, 1986.

Reports of telephone conversations contained in the case file indicate some concern within BLM regarding whether Pacific Bell could waive its hearing right and pursue an immediate appeal. At BLM's request, on November 19, 1986, Pacific Bell filed a letter confirming the waiver of its right to a hearing before BLM and requesting that the appeal process continue. After reviewing the case file, by memorandum dated December 10, 1986, the California State Office directed the Redding Area Manager to issue a new decision acknowledging Pacific Bell's waiver of its opportunity for a hearing and informing Pacific Bell of its right to appeal to this Board. BLM's decision dated December 29, 1986, carried out these instructions, and informed Pacific Bell that the reappraisal determination was final. On January 15, 1987, Pacific Bell refiled its notice of appeal and statement of reasons. The case file was then forwarded to this Board. ^{1/}

The regulation under which BLM reappraised the rental charge for the right-of-way site and informed Pacific Bell of its right to a hearing provided:

At any time not less than five years after either the grant of the permit, right of way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

43 CFR 2802.1-7(e) (1979). BLM's September 23, 1986, letter to appellant was in accord with James W. Smith (On Reconsideration), 55 IBLA 390, 396 (1981), in which this Board held that rights-of-way issued prior to the

^{1/} The file contained a photocopy of the appraisal report used as a basis for the BLM determination. The maps and photographs which were a part of that report had also been photocopied, and these photocopies were far from clearly legible. BLM is reminded of its obligation to submit the complete, original case file.

enactment of the Federal Land Policy and Management Act of 1976 (FLPMA) are not governed by the regulations promulgated under the authority of FLPMA, unless they are renewed or are conformed to the Act. If, as in this case, a preexisting right-of-way has not been renewed or conformed to the Act, the provisions of 43 CFR 2802.1-7(e) (last codified in the 1979 CFR volume) apply. American Telephone & Telegraph Co., 57 IBLA 215 (1981). BLM is required to provide the pre-FLPMA right-of-way holder reasonable notice and an opportunity for a hearing. A BLM decision imposing an increased rental without doing so is properly set aside and remanded. American Telephone & Telegraph Co., 25 IBLA 341, 346 (1976); see also Denver & Rio Grande Western Railroad, 71 IBLA 352 (1983); and U.S. Steel Corp., 71 IBLA 88 (1983). 2/

[1] No decision of the Board has addressed the procedural questions raised by Pacific Bell's choice to appeal without first pursuing a factual hearing. BLM's initial letter to Pacific Bell contemplated further action and was not a decision subject to appeal to the Board. Rather, the letter notified Pacific Bell of the proposed action and its right to a hearing on the facts supporting a reasonable rental rate. On the other hand, the December 29, 1986, BLM decision, which was issued subsequent to Pacific Bell's written waiver of a hearing and was based on the facts in the record before it was subject to appeal. Pacific Bell's appeal from that decision is properly before us under 43 CFR 4.411.

We now turn to the facts of the case and the merits of the appeal. The right-of-way was issued to Pacific Telephone and Telegraph Company (predecessor to Pacific Bell) under authority of the Act of March 1, 1878, 43 U.S.C. | 961 (1982). 3/ It was issued effective June 3, 1966, for a term of 50 years and had an annual rental rate of \$330.

The site, which is located on South Fork Mountain, Shasta County, California, has been used for a radio relay station. Appellant constructed a small shelter to house a radio transmitter and receiver, a pole-mounted

2/ The required hearing need not be held before an Administrative Law Judge but may be conducted by a local BLM official so long as certain minimal procedures are observed. See Circle L., Inc., 36 IBLA 260 (1978); see also American Telephone & Telegraph Co. (On Reconsideration), 59 IBLA 343 (1981).

Effective Mar. 27, 1986, BLM promulgated 43 CFR 2801.4 which states that a right-of-way grant issued prior to Oct. 21, 1976, "pursuant to then existing authority is covered by the provisions of this part [of the regulations] unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued." 51 FR 6542, 6543 (Feb. 25, 1986). This regulation was promulgated to implement the statutory provisions found at 43 U.S.C. | 1764(e) (1982), and is applicable only to rights-of-way issued or renewed pursuant to FLPMA. See 51 FR 6542 (Feb. 25, 1986).

3/ FLPMA repealed the statute insofar as it applies "to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System." 90 Stat. 2743, 2793 (1976). Existing rights-of-way were expressly preserved. 43 U.S.C. | 1769(a) (1982).

antenna, and a pole line to provide electrical power to the site. The right-of-way also includes use of an access road. 4/ The initial rental was \$300 for the radio relay site and use of the access road, \$5 for the pole-line right-of-way, and \$25 for that portion of land withdrawn for inclusion in the Whiskeytown Shasta-Trinity National Recreation Area under the administration of the National Park Service.

The South Fork Mountain Communication Sites Appraisal Report (Appraisal Report), used by BLM as a basis for its decision, reappraised the fair market rental value of the South Fork site for three rights-of-way sharing the same site: (1) the right-of-way now under consideration; (2) a microwave relay site also held by Pacific Bell; and (3) a right-of-way held by Northern California Communications. 5/ In its appraisal BLM examined the value of the sites but held that the "intensity of use of the lessee is not a proper function of this report" (Appraisal Report at 1). Accordingly, the fair market rental value was determined on the basis of the highest and best use of the land as a communications site, without regard for the type of communications facility on the site.

Seven sites regarded as comparable (three microwave sites, two FM radio transmission sites, one television transmission site, and one radio repeater site) were used in the appraisal. The appraiser compared the sites as to: (1) location (whether the site could be used for line-of-sight transmission, area coverage transmission over a population center, or both); (2) character of the land (relative ease of construction of facilities); (3) site amenities (access by road and availability of commercial power); and (4) electronic versatility (suitability for various types of uses). All rental rates were adjusted for inflation based on the Consumer Price Index. The report's conclusion states:

The cited leases show a very wide range of a little over \$1200 to \$20,800 per year. The two extremes, Sites [an FM radio transmitter site] and Tuscan Buttes [the television site] are little regarded as comparables as nonmarket factors materially affected both rents. The remaining comparables show a much more reasonable range of about \$3,700 to \$5,570 per year, with the subject clearly superior to the low and as clearly inferior to the high. The Hooker [microwave relay] site [with rental of \$4,944] has shown little value to the market in general and probably reflects a premium paid because of a unique value to the user. Eshom Point [FM radio transmitter site with adjusted rental of \$4,592] is the most similar but is slightly superior.

Based on these and other known leases it is my opinion that the rental value of a site on South Fork Mountain as of July 8, 1986, is \$4,500 per year.

Id. at 13.

4/ The right-of-way covers portions of secs. 3, 10, 11, 14, 15, and 23 of T. 32 N., R. 6 W., Mount Diablo Meridian.

5/ Pacific Bell's appeal of the appraisal for its microwave site was affirmed by order of the Board dated Oct. 9, 1987.

Appellant raises several points concerning BLM's appraisal. First, noting that the appraisal was based on the market comparison approach, Pacific Bell lists five other sites with equipment similar to that installed at South Fork Mountain having annual rentals of \$50, \$100, \$100, \$150, and \$1,800. Appellant argues that, regardless of the dates the various leases were executed, "there is a large discrepancy between the market value conclusion to be derived from your list of comparables, as compared to our list" (Statement of Reasons at 1).

Second, Pacific Bell states that, as a purchaser of right-of-way sites, a prime factor in its determination of what it is willing to pay a willing seller is whether the contemplated activity at the site will be revenue producing. Appellant notes that its use of the South Fork site is not revenue producing because the facility is only used for communication with maintenance crews. Appellant argues that the comparable sites used by BLM must be revenue producing because amounts Pacific Bell pays for similar revenue producing sites are in the same range. According to Pacific Bell, it pays lower amounts for non-revenue-producing radio relay sites.

Third, Pacific Bell states that in some instances the company pays rental based on its capital investment at a site and notes that its investment in radio equipment at the South Fork Mountain site is less than \$5,000. The company argues that dollar investment is one indication of fair-market rental value, and that in this case the reappraised yearly rental is almost the same as its total capital investment at the site.

[2] The Board has consistently found the method of appraisal used by BLM for determining the fair market rental value of communication sites to be acceptable. See, e.g., Denver & Rio Grand Western Railroad Co., 101 IBLA 252 (1988); Harvey Singleton, 101 IBLA 248 (1988). The Board also has a well-established rule that an appraisal of a right-of-way will not be set aside when there is no showing that BLM has erred in appraising the fair-market value of a right-of-way rental or the appellant fails to show that the resulting charges are excessive. See, e.g., Harvey Singleton, supra; Blue Mesa Road Association, 89 IBLA 120 (1985); and B & M Service, Inc., 48 IBLA 233 (1980). Absent a showing of error in the choice of appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. Mesa Broadcasting Co., 94 IBLA 381 (1986); James W. Smith, 46 IBLA 233 (1980).

Reviewing appellant's argument in light of the Board's standards, we conclude that, while the points made by appellant may be correct, they fail to show either error in BLM's appraisal method or that the resulting charges are excessive. Appellant lists sites it uses for non-revenue-producing radio relay transmission. An appraisal by BLM using appellant's sites as comparable sites would undoubtedly result in a lower rental rate. However, the report under review clearly shows that the approach taken by BLM was to appraise the fair market rental value as communication sites, without regard to the specific purposes for which the sites are utilized. Thus, the appraisal report found the fair-market rental value of all three South Fork sites to be the same. The fact that another approach in conducting an appraisal would reach a different result does not mean that BLM erred when selecting the approach it followed. Similarly, although the

yearly rental Pacific Bell, or another party, would be willing to pay may vary depending upon whether the site is to be revenue producing or depending upon the value of the equipment to be installed, we do not find a basis for holding that BLM is compelled to consider these factors. Appellant has not shown that BLM erred either in selecting comparable sites for the appraisal or in choosing the features used for comparison.

[3] Although we affirm BLM's decision imposing an increased rental for appellant's right-of-way grant, the decision must be modified in one respect. BLM's September 22, 1986, letter to Pacific Bell stated that the increased rental was due for the lease year June 1986 to June 1987. The regulation under which the reappraisal was conducted provides that new charges may be imposed "commencing with the ensuing charge year." 43 CFR 2802.1-7(e) (1979). In Full Circle, Inc., 35 IBLA 325, 339, 85 I.D. 207, 215 (1978), we held that, under this provision, the reappraised rental "should be imposed only after the authorized officer's decision following notice and an opportunity for hearing and would be applicable to the next charge year." For this reason we modify BLM's decision to impose the reappraised rental rate as of the rental year beginning June 4, 1987. The record shows that Pacific Bell paid the rental for the prior year at the lower rate and no further amount is due for that year.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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R. W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge